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In the
Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES,

Petitioners,

v.

LARRY LEAKE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Response in Opposition to Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether *Davis v. FEC*, 128 S. Ct. 2759 (2008), should prompt review when there are fundamental differences between the discriminatory limits at issue in *Davis* and the structure of North Carolina's system of voluntary public financing for judicial elections?

2. Whether the applicability of the Court's recent decision in *Davis* to a voluntary public campaign funding system should be reviewed when there is no split among the Circuits and the petition presents novel issues that were not considered by the appellate court below – or by any appellate court – and that should be reviewed in the first instance by the lower courts?

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The Order and Judgment of the United States District Court for the Eastern District of North Carolina, from which petitioners appealed to the United States Court of Appeals for the Fourth Circuit, were not attached to the petition for writ of certiorari. They are attached to this Brief as Appendix pages 1a-16a.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Petitioners attached copies of constitutional and statutory provisions involved in this action as appendices to their petition for writ of certiorari. The copies of N.C. Gen. Stat. §§ 163-278.66 and -278.67 attached to the petition, however, are outdated versions of the statutes, which were amended effective August 2, 2008. 2008 N.C. Sess. Laws 150, § 7(b) and (c); § 10.2(b) and (c). In addition, the same session law repealed N.C. Gen. Stat. § 163-278.13(e2)(3), which is printed at pages 66a-67a of the petition. 2008 N.C. Sess. Laws 150, § 7(a). Because the revised statutes have not yet been published, the relevant sections of 2008 N.C. Sess. Laws 150 are attached to this Brief as Appendix pages 17a-21a.

STATEMENT

While a number of public funding campaign programs exist for executive, legislative or local offices, North Carolina was the first and remains one of the few States to implement a program for public financing of judicial campaigns. In 2002, the North Carolina General Assembly enacted the Judicial Campaign Reform Act ("JCRA"), 2002 N.C. Sess. Laws 158, creating the North Carolina Public Campaign Financing Fund ("the Fund"). N.C. Gen. Stat., Chapter 163, Article 22D (N.C. Gen. Stat.§ 163-278.61, *et seq.*). The Fund was first used in the 2004 election. Its purpose is

> to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from *the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.*

N.C. Gen. Stat. § 163-278.61 (emphasis added).

The JCRA, administered by the State Board of Elections ("State Board"), provides a comprehensive

program that allows candidates seeking election to appellate judicial seats, once qualified, voluntarily to accept strict limitations on private fund-raising activity in exchange for limited public financing of their campaigns. N.C. Gen. Stat. § 163-278.64(d). To qualify, candidates must file a notice of intent to participate and collect qualifying contributions from at least 350 registered voters, in amounts between $10 and $500, which in aggregate must equal between 30 and 60 times the candidate's filing fee. N.C. Gen. Stat. § 163-278.64(a)-(b). Once a candidate has qualified, no further private contributions can be raised by him. N.C. Gen. Stat. § 163-278.64(d). Upon being certified for participation, a participating candidate in a contested general election then receives an initial base level of funding and may also receive a limited amount of additional funds ("matching funds") in the event that a nonparticipating opponent or independent group spends more than a pre-determined sum (the "trigger amount") in opposition to the candidacy. N.C. Gen. Stat. § 163-278.67(a). In a primary, the trigger amount equals the maximum qualifying contribution for participating candidates; in a general election, it equals the base level of funding.[1] *Id.*

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[1] In the 2006 election, in which petitioner Duke was a candidate for Chief Justice of North Carolina, the base level of funding for that office was $216,650 for the general election. Because the Chief Justice has the highest salary of appellate judges, and because the base level of funding is

A participating candidate cannot receive any matching funds if total spending in opposition to the candidate does not exceed the trigger amount. N.C. Gen. Stat. § 163-278.65(b)(3). Matching funds are disbursed in an amount equal to the total by which the trigger is exceeded by opposition funds. N.C. Gen. Stat. § 163-278.67(a). Opposition funds include contributions received by nonparticipating candidates as well as independent expenditures or electioneering communications made by persons or entities in support of a nonparticipating candidate.[2] The total matching funds available in a contested primary are capped at two times the maximum qualifying contributions for the office sought. N.C. Gen. Stat. § 163-278.67(b). In a contested general election,

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based on the filing fee for office, which is in turn based on salary for the office, the base level of funding for all other appellate campaigns would be lower than that for Chief Justice.

[2] N.C. Gen. Stat. § 163-278.66(a) provides that either making independent expenditures or paying for electioneering communications, as those terms are statutorily defined, can trigger the release of matching funds. For brevity, "independent expenditures" will be used to refer to both kinds of expenditures.

matching funds are capped at two times the base level of funding. N.C. Gen. Stat. § 163-278.67(c).[3]

To facilitate the matching funds provision, the JCRA contains requirements for reporting the receipt or expenditure of opposition funds. N.C. Gen. Stat. § 163-278.66(a). A nonparticipating candidate facing a participating opponent must make an initial report to the Board disclosing contributions received within 24 hours after those contributions exceed 80% of the trigger for matching funds. *Id.* Entities making independent expenditures must make an initial report within 24 hours of expending more than $5,000. *Id.* After the initial report, nonparticipating candidates must report additional contributions received and other reporting entities must report additional independent expenditures made according to a schedule promulgated by the State Board.[4] N.C. Gen. Stat. § 163-278.66(a). In 2006, the State Board set

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[3] For Chief Justice in 2006, that amount was $433,300.

[4] 2008 N.C. Sess. Laws 150 deleted "obligations" from the items that nonparticipating candidates and entities making independent expenditures are required to report. 2008 N.C. Sess. Laws 150, § 10.2(b).

eight reporting dates between August 22 and November 3.[5]

Because participating candidates may not receive any private contributions after qualifying to participate in the Fund, the JCRA requires special reports of qualifying contributions for participating candidates. In addition, all generally applicable reporting requirements for political committees remain in place for participating candidate committees, including mandatory quarterly reports.

Thus, most candidates, including participating candidates, must file a total of at least 6 reports.[6] Similarly, any political committee making an independent expenditure on behalf of a participating candidate must report that independent expenditure to the State Board. N.C. Gen. Stat. § 163-278.9. Any

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[5] State Board, *August 23, 2006, Letter to The Rusty Duke Committee*, http://www.sboe.state.nc.us/cf_pdf'2006/20070803_55557.pdf .

[6] Petitioners' assertion that certified candidates need make only two reports (Pet. at 7) is incorrect. A candidate is exempted from filing campaign finance reports only if he or she: (1) does not receive more than three thousand dollars ($3,000) in contributions; and (2) does not receive more than three thousand dollars ($3,000) in loans; and (3) does not spend more than three thousand dollars ($3,000). N.C. Gen. Stat. § 163-278.10A(a).

other person or entity making independent expenditures must report them to the State Board within 30 days after the independent expenditures exceed $100 or 10 days before an election that the expenditure affects, whichever is earlier. N.C. Gen. Stat. § 163-278.12.

REASONS TO DENY THE PETITION

This Court has upheld voluntary public funding programs as constitutional because such systems are efforts "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976). Public financing is unique among campaign finance regulations because it both increases speech and reduces the potential for corruption. In addition, public financing facilitates "communication by candidates with the electorate" and frees "candidates from the pressures of fundraising." *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (internal citations and quotations omitted), *cert. denied*, 520 U.S. 1229 (1997).

As the Fourth Circuit recognized, "judicial campaigns in several other states have raised and spent multiple millions of dollars." *North Carolina Right to Life Committee Fund for Independent Political*

Expenditures v. Leake, 524 F.3d 427, 437 (4th Cir. 2008) ("*Leake*"). Against this backdrop, North Carolina adopted a public funding program for appellate judicial candidates to further its compelling state interest in fair and impartial courts. *Id.* ("The concern for promoting and protecting the impartiality and independence of the judiciary . . . dates back at least to our nation's founding, when Alexander Hamilton wrote that 'the complete independence of the courts of justice is peculiarly essential' to our form of government."). *Id.* at 441 (quoting *The Federalist No. 78* at 426 (E. H. Scott ed., 1898)).

Petitioners focus their petition for certiorari on this Court's recent decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008). As the Court recognized in *Davis*, there are crucial differences between the Millionaire's Amendment at issue there and public funding systems such as the one at issue here. *See Davis*, 128 S. Ct. at 2772 ("The choice imposed by [the Millionaire's Amendment] is not remotely parallel to that in *Buckley*."). The Court made clear that it was the discriminatory contribution limits before it in *Davis* that made the Millionaire's Amendment unconstitutional, not the mere fact that increased spending by the self-financed candidate triggered changes in the contribution limits. Indeed, the Court emphasized that the statute would have imposed no burden on protected speech if Congress had simply

raised contribution limits for both candidates. *Davis*, 128 S. Ct. at 2770.

The concern for discriminatory treatment of candidates otherwise similarly situated that underlies *Davis* is not present in this case. Here, any candidate may choose whether to participate in the Fund. After that decision, participating and nonparticipating candidates are not similarly situated. This presents a very different context from that considered in *Davis*, and it is in that different context that the Fourth Circuit's decision must be viewed.

The unanimous Fourth Circuit panel properly "conclude[d] that the provisions challenged . . . , which embody North Carolina's effort to protect this vital interest in an independent judiciary, are within the limits placed on the state by the First Amendment." *Leake*, 524 F.3d at 441. The Fourth Circuit further held that the matching fund provisions provided a "modest" incentive for participation in the program and did not render the program coercive. *Id.* at 436. Though it would clearly be permissible under *Buckley* for North Carolina to provide the maximum amount to every participating candidate as an initial grant, in practice this would waste thousands of public dollars without any discernible benefit to the electoral process.

Petitioners now ask this Court to review whether a State, for the purpose of protecting the real and

perceived integrity and impartiality of its judiciary, may establish a voluntary public funding program for appellate judicial offices and provide reasonable incentives for participation in the program. This Court should deny the instant petition and leave the sound reasoning of the Fourth Circuit undisturbed.

Because neither the district court nor the Court of Appeals has yet reviewed whether *Davis* alters the analysis regarding the constitutionality of the JCRA's provisions, review by this Court would be premature.[7] In fact, no lower court in the country has fully reviewed the applicability of *Davis* to the specific circumstances presented by public financing systems.[8] This Court has traditionally allowed the lower courts to grapple squarely with an issue before taking up the issue itself. The Court should deny the petition or, in the alternative, remand the case to the Fourth Circuit

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[7] This is especially so given the lack of a developed record in this case, which was decided on a motion to dismiss.

[8] Early-stage challenges to legislative and statewide offices related to *Davis* are pending in both Connecticut and Arizona. Plaintiffs' Motion for Preliminary Injunction, *McComish et. al., v. Brewer et. al.*, No. CV-081550-PHX-ROS (D. Az. Sept. 2, 2008); Plaintiffs' Motion for Reconsideration, *Green Party of Connecticut et. al., v. Garfield et. al.*, No. 06-CV-01030-SRU (D. Conn. July 10, 2008).

to consider how, if at all, *Davis* applies in this distinct context.

I. The Decision of the Fourth Circuit Is Not in Conflict with this Court's Decision in *Davis*.

The petition in this case turns on the mistaken contention that the Court of Appeals' decision conflicts with this Court's recent decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008). That argument, however, ignores fundamental differences between the discriminatory contribution limits at issue in *Davis* and the JCRA's provisions challenged here.

The Court in *Davis* held that the nature of the "unprecedented penalty" that the Millionaire's Amendment imposed on a self-financed candidate was "subjection to discriminatory fundraising limitations." *See* 128 S. Ct. at 2771. It was the "different contribution and coordinated party expenditure limits on candidates vying for the same seat" that were "antithetical to the First Amendment." 128 S. Ct at 2774. Moreover, the discriminatory treatment that concerned the Court in *Davis* related to contribution limits in the context of private fundraising. There is no question under the governing precedent that contribution limits impose burdens on First Amendment rights, and therefore must be closely drawn to serve a sufficiently important government

interest. *See Buckley*, 424 U.S. at 15; *Randall v. Sorrell*, 548 U.S. 230, 247 (2006).

In contrast, since the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources," *Buckley*, 424 U.S. at 49, public funding is viewed as facilitating and enlarging speech. *See id.* at 92-93; *see also Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 283-86 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980). This case, then, presents a completely distinct factual and legal context from that considered in *Davis*.

A. The Burden on First Amendment Rights Found by the Court in *Davis* is Inapplicable to Voluntary Public Funding Systems.

Petitioners here challenge matching fund provisions in a voluntary public funding program in which both candidates face an identical set of choices. At the outset of a campaign, all candidates may choose whether to participate in public funding and accept spending limits and stringent fundraising restrictions or to finance their campaigns through private contributions and be free of spending limits. The constitutionality of spending limits that are part of voluntary public funding systems was upheld in *Buckley* and reaffirmed in *Davis*. *Davis*, 128 S. Ct. at

2772 ("Congress 'may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.'"(quoting *Buckley* 424 U.S. at 57 n.65)). Yet, here it is the participating candidate – and not the non-participating candidate – who is subjected to more restrictive regulation.

In *Davis*, both candidates were initially subject to mandatory limits on private fundraising. The limits became asymmetrical, however, once one candidate announced an intention to expend a substantial amount of personal funds on his own campaign. *Davis*, 128 S. Ct. at 2766. The self-financed candidate's fundraising efforts remained subject to the ordinary $2,300 contribution limit and the ordinary limit on coordinated party spending. But his opponent was freed from those limits, and could receive contributions up to three times the ordinary limit and take advantage of additional coordinated party spending. *Davis*, 128 S. Ct. at 2765 (citing BCRA § 319(a), 2 U.S.C. § 441a-1(a)). Thus, the government, by continuing to strictly limit one candidate and significantly relaxing limits on his opponent, violated the First Amendment rights of the self-financed candidate because the law subjected two similarly-situated candidates to different regulatory requirements.

Here, a participating and a nonparticipating candidate under the JCRA are not similarly situated. One candidate opts to accept the public financing option established by the JCRA with all of its associated benefits and burdens; the other chooses to remain in the private financing system, with its own particular benefits and burdens. The rational candidate, having knowledge of all those respective benefits and burdens – including the matching funds provisions – will choose the option that she feels will maximize her communication with the electorate. So long as the differences between the relative benefits and burdens of the two alternatives do not become so extreme that they coerce participation, there is no First Amendment concern. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000).

In *Davis*, the Court noted that, "[i]f § 319(a) simply raised the contribution limits for all candidates, Davis' argument would plainly fail." *Davis*, 128 S. Ct. at 2770. The Court reasoned that requiring "a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations," *id.* at 2771, was a problem of constitutional dimension. But this problem does not and cannot exist in North Carolina's public financing system, where the nonparticipating candidate has no additional fundraising strictures placed upon her by the public financing program after

the trigger is met. Indeed, it is only the participating candidate who from the beginning of the public financing program is subject to limits imposed by the public financing program, e.g., a cap on total funding available and restrictions on how money can be expended. *See* N.C. Gen. Stat. § 163-278.68.

Under *Buckley*, North Carolina indisputably could have given each participating candidate the maximum amount allowable during an election cycle at the outset. Instead, the State opted to provide an initial grant and then to release incrementally a limited amount of matching funds only when circumstances in a particular race warrant more funding. Petitioners would have the Court rule that the privately financed candidate is impermissibly burdened when North Carolina saves state tax dollars by giving the publicly financed candidate *less* money to begin with and provides full funding only when the race becomes more expensive. In essence, petitioners argue that their First Amendment rights are infringed merely because the State of North Carolina provides funds to participating candidates incrementally rather than in one lump sum. Such an argument finds no support in the precedent of this Court, including *Davis*, or in logic.

B. The Matching Funds Provision Does Not Burden Petitioners' First Amendment Rights.

The Fourth Circuit rightly noted that under the matching fund provisions of the Fund, petitioners "remain free to raise and spend as much money, and engage in as much political speech, as they desire," and that the distribution of matching funds "'furthers, not abridges, pertinent First Amendment values' by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Leake*, 524 F.3d at 437 (quoting *Buckley*, 424 U.S. at 92-93). The fact that the North Carolina program provides for additional public funds to be released to participating candidates in stages, if and when triggered, does not burden the First Amendment rights of candidates who choose not to participate. If one lump-sum distribution of the maximum amount available would not chill the First Amendment rights of nonparticipating candidates or prevent them from raising or spending as much as they desire, incremental distributions surely cannot do so.

Since the initial grant to participating candidates imposes no constitutional burden on the speech of nonparticipating candidates, it follows that the provision of additional funds to participating candidates in response to opposition funds similarly does not impose any burden on the speech of

nonparticipating candidates. Whether the public funding stems from the initial grant or a triggered match, the nature of the asserted injury to nonparticipating candidates is equally non-existent. *See Buckley*, 424 U.S. at 95. Under *Buckley* and its progeny, there is simply no burden on petitioners' protected speech rights presented in this case; *Davis* does not hold otherwise.

Under the JCRA, there is also no burden on the speech of independent groups. The JCRA does not limit organizational fundraising or spending on political speech under any circumstances. The Fourth Circuit rightly noted that under the matching fund provisions of the JCRA, petitioners "remain free to raise and spend as much money, and engage in as much political speech, as they desire." *Leake*, 524 F.3d at 437 (citing *Buckley*, 424 U.S. at 92-93).

C. The Matching Funds Provision Is Appropriately Tailored to Further Multiple Compelling State Interests.

Even if this Court were to find that the decision in *Davis* is applicable and that petitioners' First Amendment rights are burdened, the Fourth Circuit's decision that the matching funds provision is constitutional would still stand. This is so because North Carolina's statute is appropriately tailored to achieve compelling state interests, including reducing

corruption or the appearance of corruption in appellate judicial elections and of encouraging participation in a system intended to further these goals.

Without question, reducing the potential for corruption in judicial elections and assuring the integrity of the courts is a matter of special importance. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (noting that the state interest in maintaining judicial integrity is of "vital importance" and that "judicial integrity is . . . a state interest of the highest order").

To achieve its goal of reducing corruption or its appearance, the state has a related compelling interest in assuring reasonable levels of participation in the program, by convincing candidates to opt in and to forgo their right to raise and spend an unlimited amount of private funds. *See Vote Choice*, 4 F.3d at 39 (state has compelling interest in creating incentives for candidates to accept public financing). The program balances these interests against an equally important interest in conserving the public fisc. *Buckley*, 424 U.S. at 96. In contrast, in *Davis* this Court held that the statute in question impermissibly burdened the First Amendment because there was no compelling governmental interest justifying the burden. The Court reasoned that the burden on personal contributions to one's own campaign did nothing to

further Congress' proffered interest in eliminating corruption; indeed, the potential for higher contributions from one donor to one of the candidates actually undermines the governmental interest underpinning the contribution limit.

Had this case been decided on summary judgment rather than on the State's motion to dismiss, the record would contain evidence demonstrating how the Fund in general, and the matching funds provisions that are an integral part of the Fund in particular, further compelling state interests. Even absent such a developed record, however, it is clear that the Fund and the matching funds provision further interests that this Court and lower courts have consistently found to be compelling state interests. Nothing in *Davis* changes that.

This case differs from *Davis* in another way. In *Davis*, the Court considered legislation passed by Congress that directly affected elections for Congress. The Court expressed concern in *Davis* that the Millionaire's Amendment "ha[d] ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office," when "[t]he Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives." 128 S. Ct. at 2773-74. A concern that legislative self-interest rather than a significant

governmental interest motivates the challenged statutes is not present in this case because here the legislation applies to non-partisan judicial elections, not legislators' own elections.

D. The Reporting Requirements Challenged by Petitioners Are Constitutional.

Petitioners seek review of the Fourth Circuit's decision to uphold North Carolina's reporting requirements. Contrary to petitioners' argument, however, mere disclosure requirements need not meet the exacting test of strict scrutiny. They need only bear a substantial relation to an important state interest. *Buckley*, 424 U.S. at 64. As the Fourth Circuit concluded, North Carolina's reporting requirements are substantially related to the important state interests of informing the electorate, deterring actual corruption or the appearance of corruption and "enabling the effective administration of matching funds." *Id.* at 440.

Petitioners' arguments to this Court about burdensome reporting are based on a theoretical possibility and not an actual threat, as recognized by the Fourth Circuit. In an effort to demonstrate that the reporting requirements are onerous, petitioners represent that "noncertified candidates could be required to file dozens of separate reports during the primary and election campaign before the trigger

amount has even been reached, and every day thereafter." (Pet. at 7) As recognized by the Fourth Circuit, N.C. Gen. Stat. § 163-278.66(a) provides that the State Board is to establish a schedule for the filing of these reports. In 2006, this schedule required Duke's campaign to file a total of eight reports, a requirement the court found to be "not particularly burdensome." *Leake*, 524 F.3d at 439-40. There is no reason to believe that the reporting requirements would ever be as onerous as petitioners contend. Petitioners would have this Court grant its writ of certiorari to consider allegations based on nothing more than speculation.

II. No Circuit Has Considered the Application of *Davis* to Public Funding Systems and Thus There Cannot Be a Split among the Circuits.

Petitioners overstate the extent of the disagreement among the courts of appeals regarding whether matching fund provisions such as those of the JCRA impermissibly infringe upon First Amendment rights. The fact that in *Davis* the Court cited to *Day* does not mean that it implicitly decided a significant and complex issue that was not before it in *Davis*.

Far more important, the gravamen of both of petitioners' questions presented concern the implications of *Davis* for public funding systems, which has not yet been the subject of even a single

circuit court opinion. It goes without saying that there can be no circuit split on an issue that has yet to be reviewed by the federal courts. No other circuit decision involves the public financing of judicial campaigns, designed to protect both the appearance and reality of an impartial appellate judiciary – a state interest not considered in *Day*. Here, the North Carolina General Assembly has sought to "attempt some new reform" that would permit appellate judges "to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting). As the decision of the Fourth Circuit is the first Court of Appeals decision dealing with a program for public financing of judicial campaigns, which it recognized advances important governmental interests, *see Leake*, 524 F.3d at 441, its decision cannot be in conflict with decisions from other circuits that do not arise in a similar context.

In addition, *Day* does not contradict the Fourth Circuit's holding below. *Day* itself notes that "[t]he state interest in preventing corruption, or the appearance of corruption, in the political process has been recognized as a compelling state interest that justifies" some infringement on First Amendment rights. *Day v. Holahan*, 34 F.3d 1356, 1363 (8th Cir. 1994). That, however, was not the interest put forth in *Day* in support of the challenged statute. The interest that was put forth to support the specific provision at

issue there – encouraging participation in the public financing system – was not compelling in the Eighth Circuit's view because even without the challenged provision, participation was already at 97%.

By contrast, the Eighth Circuit's decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997), dealt with a public financing mechanism more similar to the matching funds provision here, where a fundraising cap for participating candidates was waived if nonparticipating candidates raised or spent in excess of a threshold amount. The Eighth Circuit upheld that facet of Minnesota's public campaign financing program, aligning itself with the First Circuit in *Daggett* and *Vote Choice*, the Sixth Circuit in *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999), and now the Fourth Circuit. Like this case, *Daggett* and *Gable* both dealt specifically with matching funds, while *Rosenstiel* dealt with a corollary mechanism. On the issue presented in this case, there is no split among the circuits.

The Fourth Circuit's decision comports with every other federal case, from *Buckley* forward, in applying the legal standard used to evaluate the constitutionality of public funding systems, which requires courts to uphold laws supported by a compelling state interest. *See Davis*, 128 S.Ct. at

2773; *Buckley*, 424 U.S. at 96; *Rosenstiel*, 101 F.3d at 1553; *Day*, 34 F.3d at 1363. To the extent any claim might be made that *Davis* may also apply to such systems, the Court should allow the lower courts to consider the issue as it may come before them, allowing analysis to percolate and develop, rather than acting prematurely to decide questions no other court has had the opportunity to consider fully. For this reason, the petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied. Alternatively, if the petition is granted, the decision of the Fourth Circuit should be vacated and the matter remanded for further consideration in light of *Davis* and for development of an appropriate record.

Respectfully submitted,

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September 2008

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APPENDIX

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Order, No. 5:06-CV-324-BR
(E.D.N.C. March 30, 2007)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-CV-324-BR

BARBARA JACKSON, et al.,	)	
Plaintiffs,	)	
v.	)	ORDER
LARRY LEAKE, et al.,	)	
Defendants.	)	

This matter is before the court on defendants' and intervenor-defendants' motions to dismiss. Plaintiffs filed a response to the motions, and defendants and intervenor-defendants filed replies. The motions are ripe for disposition.

I. BACKGROUND

On 8 August 2005, plaintiffs Barbara Jackson, Wilton R. Duke, North Carolina Right to Life Committee Fund for Independent Political

Expenditures ("IEPAC"), and North Carolina Right to Life State Political Action Committee ("SPAC") filed this action in the Middle District of North Carolina. They assert constitutional challenges to the North Carolina Public Campaign Financing Fund (the "Fund"), N.C. Gen. Stat. § 163-278.61 et seq., which provides a voluntary source of campaign financing to candidates for the North Carolina appellate courts, and the provision enacted to implement that Fund, N.C. Gen. Stat. § 84-34.[1] On 7 August 2006, U.S. District Judge N. Carlton Tilley, Jr. held that IEPAC and SPAC lack standing to sue the District Attorney for Guilford County, dismissed that defendant, and transferred the case to this court.

On 5 September 2006, the undersigned held a status conference, ruled on a number of motions, and set a briefing schedule on the remaining motions. On 26 October 2006, the court (1) found Jackson lacks standing with respect to all her claims except that challenging N.C. Gen. Stat. § 84-34; (2) dismissed plaintiffs' claims challenging § 84-34 for lack of jurisdiction; and, (3) denied plaintiffs' motion for a preliminary injunction. Remaining are Duke's and

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[1] That statute requires every active member of the North Carolina State Bar to pay annually a $50 "surcharge." N.C. Gen. Stat. § 84-34.

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SPAC's claims challenging N.C. Gen. Stat. § 163-278.13(e2)(3) (the "21 day provision"); Duke's and IEPAC's claims challenging N.C. Gen. Stat. §§ 163-278.66(a) and § 163-278.67 (the "reporting and rescue funds provisions"),[2] and, Duke's claim challenging the public financing scheme as a whole, all of which are against members of the North Carolina State Board of Elections; Roy Cooper, the Attorney General for the

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[2] Section 163-278.66 requires nonparticipating candidates to report campaign contributions or expenditures that exceed certain specified trigger amounts to the Board within 24 hours and any independent entities making expenditures in support of a nonparticipating candidate to make similar reports to the Board. . . ; (2) Section 163-278.67 provides for "rescue funds" for participating candidates in the event the expenditures of a nonparticipating candidate (or of an independent entity in support of a nonparticipating candidate) exceed certain specified trigger amounts. . . [and]; (3) Section 163-278.13(e2)(3) prohibits contributions to the campaign of any candidate during the period beginning 21 days before the general election and ending the day after the general election. . . .

(10/26/06 Order at 2 (quoting Jackson v. Leake, No. 1:05-CV-691, 2006 WL 2264027, *1 (M.D.N.C. Aug. 7, 2006).

State of North Carolina; and C. Colon Willoughby, Jr., the District Attorney for Wake County.[3]

II. DISCUSSION

A. Standing

As the court noted in its earlier order, defendants argue that plaintiffs lack standing as to their claims against Attorney General Cooper and District Attorney Willoughby. (10/26/06 Order at 7 n.3.) Because this issue is jurisdictional, the court must address it before considering the motions to dismiss for failure to state a claim. (See id. at 4 (citing Emory v. Roanoke City School Bd., 432 F. 3d 294, 298 (4th Cir. 2005).)

> The doctrine of standing is an integral component of the case or controversy requirement. There are three components of a constitutional standing: (1) the plaintiff must allege that he or she suffered an actual or threatened injury that is not conjectural or hypothetical; (2) the injury must be fairly

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[3] While members of the North Carolina Bar Administrative Committee remain named defendants, they are not required to participate in these proceedings; they are, however, bound by any judgment entered in the action. (See 9/6/06 Order (allowing said defendants' motion pursuant to Fed. R. Civ. P. 20(b).)

> traceable to the challenged conduct; and (3) a favorable decision must be likely to redress the injury. The party attempting to invoke federal jurisdiction bears the burden of establishing standing.

(Id. (quoting Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006).)

Defendants contend that plaintiffs have alleged no actual or imminent injury traceable to any action of Cooper or Willoughby. Plaintiffs name Cooper as a defendant based on his authority, as Attorney General, to provide the State Board of Elections with legal assistance in execution of the Board's authority to assist a county or municipal board of elections in matters where litigation is contemplated or had been initiated and where the uniform administration of Chapter 163 has or would be threatened. (See Second Am. Compl. ¶ 13 (citing N.C. Gen. Stat. § 163-25[4]).)

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[4] That statute provides in relevant part:

> The State Board of Elections shall possess authority to assist any county or municipal board of elections in any matter in which litigation is contemplated or has been initiated, provided, the county or municipal board of elections in such county petitions, by majority resolution, for such assistance form the State Board of Elections, and,

"Consequently," plaintiffs state, "Attorney General Cooper can assist the State Board of Elections in its determination of whether litigation should be pursued," including litigation against plaintiffs regarding the enforcement of North Carolina's public financing scheme. (9/27/06 Mem. Opp'n Mot. Dismiss at 15)

There is not a sufficient connection between the Attorney General's actions pursuant to this authority and enforcement of the Fund's provisions against plaintiffs. As a general matter, even though the

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> provided further, that the State Board of Elections determines, in its sole discretion by majority vote, to assist in any such matter. It is further stipulated that the State Board of Elections shall not be authorized under this provision to enter into any litigation in assistance to counties, except in those instances where the uniform administration of Chapter 163 of the General Statutes of North Carolina has been, or would be threatened.
>
> The Attorney General shall provide the State Board of Elections with legal assistance in execution of its authority under this section or, in his discretion, recommend that private counsel be employed.

N.C. Gen. Stat. § 163-25.

Attorney General might offer legal assistance to the Board under § 163-25, whether or not the challenged provisions of the Fund are enforced against plaintiffs is ultimately left up to the Board itself. See N.C. Gen. Stat. § 163-278.68(a) ("The Board . . . shall administer the provisions of this Article."). More importantly, if plaintiffs violated the challenged statues, § 163-25 does not even come into play. As Judge Tilley recognized, if SPAC committed a violation of the statute it challenges, the 21 day provision, it would be prosecuted criminally, if at all, by the Guilford County District Attorney (after the Board of Elections conducts an investigation and refers the matter for prosecution). Jackson v. Leake, No. 1:05-CV-691, 2006 WL 2264027, *5, 7 (M.D.N.C. Aug. 7, 2006). If IEPAC violated the statutes it challenges, the reporting and rescue funds provisions, it faces civil penalties imposed by the Board of Elections (after consultation with the Guilford County District Attorney). Id. at *5. If Duke violated any of the provisions at issue he, as a judicial candidate, could be prosecuted by the District Attorney for Wake County (after the Board of Elections conducts an investigation and refers the matter for prosecution) and/or subjected to civil penalties (after the Board of Elections consulted with that District Attorney). N.C. Gen. Stat. §§ 163-278.27(b)(2), -278.34(f). The Attorney General is not directly involved in enforcing the Fund's provisions against plaintiffs. Any harm

plaintiffs suffer in relation to enforcement of the Fund is fairly traceable to the Board's conduct.

Turning to Willoughby, the District Attorney for Wake County, plaintiffs argue that they have standing to sue him given that he possesses general prosecutorial authority under N.C. Gen. Stat. § 7A-61. That statute provides in relevant part that "[t]he district attorney shall . . . prosecute in a timely manner in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district . . . ." N.C. Gen. Stat. § 7A-61. While the District Attorney for Wake County could conceivably exercise his authority under § 7A-61 to prosecute a violation the 21 day provision occurring in his district, it is highly unlikely he would do so in the absence of a report from the Board of Elections pursuant to § 163-278.27(c). The generalized duty of the District Attorney for Wake County to prosecute criminal infractions occurring in his district is not a sufficient basis to connect him to enforcement of the statute at issue. Any injury that plaintiffs might suffer as a result of his conduct is speculative.

Plaintiffs have failed to show they possess standing to sue the Attorney General and the District Attorney

for Wake County, and those defendants will be dismissed.

B. Failure to State a Claim

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the complaint is construed in the light most favorable to the non-moving party, and its allegations are taken as true. As stated by the Supreme Court:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." Revene v. Charles County Com'rs, 882 F.2d 870, 872 (4th Cir. 1989).

In conjunction with plaintiffs' preliminary injunctive relief request, the court considered the legal merits of their claims and concluded that plaintiffs

were not likely to succeed. For the reasons set forth in the order denying plaintiffs' motion for a preliminary injunction, (see 10/26/06 Order at 11-22), the court finds plaintiffs have failed to state claims against defendant members of the State Board of Elections.

III. CONCLUSION

In sum, the motions to dismiss are ALLOWED. Plaintiff Duke's claims against defendants C. Colon Willoughby, Jr. and Roy Cooper are DISMISSED for lack of standing. Plaintiff Duke's, IEPAC's, and SPAC's claims against the members of the State Board of Elections challenging N.C. Gen. Stat. §§ 163-278.12(e2)(3), 163-278.66, and 163-278.67 and the public financing scheme as a whole are DISMISSED for failure to state a claim. Plaintiffs' motion for class certification is DENIED as moot.

This 30 March 2007.

/s/W. Earl Britt
W. Earl Britt
Senior U.S. District Judge

Judgment, No. 5:06-CV-324-BR
(E.D.N.C. March 30, 2007)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Barbara Jackson, North Carolina Right to Life Committee Fund for Independent Political Expenditures, North Carolina State Political Action Committee, W. Russell Duke, Jr.,
Plaintiffs,

v.

JUDGMENT

Larry Leake, in his official capacity as the Chairperson of the North Carolina Board of Elections, Lorraine G. Shinn, in her official capacity as a member of the North Carolina Board of Elections, Charles Winfree, in his official capacity as a member of the North Carolina Board of Elections, Genevieve C. Sims, in her official capacity as a member of the North Carolina Board of Elections, Robert Cordle, in his official capacity as a member of the North Carolina Board of Elections, Roy Cooper, in his official capacity

as the Attorney General for the)
State of North Carolina, C. Colon)
Willoughby, Jr., in his official)
capacity as District Attorney for)
Wake County, Robert Stuart)
Albright, in his official capacity as)
District Attorney for Guilford)
County, and as a representative of)
the class of District Attorneys in the)
State of North Carolina, Keith M.)
Kapp, J. Michael Booe, in his official)
capacity as Vice-chairperson of the)
North Carolina Bar Administrative)
Committee, David Benbow, in his)
official capacity as a member of the)
North Carolina Bar Administrative)
Committee, David Yates Bingham,)
in his official capacity as a member)
of the North Carolina Bar)
Administrative Committee, Gilbert)
W. Chichester, in his official capacity)
as a member of the North Carolina)
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Administrative Committee, Patricia)
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as a member of the North Carolina)
Bar Administrative Committee,)
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capacity as a member of the North)
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Administrative Committee, David T.)
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Poisson, Sr., in his official capacity)
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Committee, Richard G. Roose, in his)

official capacity as a member of the North Carolina Bar Administrative Committee, Jan H. Samet, in her official capacity as a member of the North Carolina Bar Administrative Committee, Judy D. Thompson, in her official capacity as a member of the North Carolina Bar Administrative Committee, All Defendants, Defendants.	)	No. 5:06-CV-324-BR
and James R. Ansley and Common Cause North Carolina, Intervenor-Defendants.	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss is GRANTED IN PART, that the District Attorney for Guilford County be DISMISSED, both in his official capacity and as a representative of the class of district attorneys in the State of North Carolina, as a party to this case, that plaintiff Jackson's claims challenging N.C. Stat 163-278.12(e2)(3), 163-278.66 and 163-

278.67 and public financing scheme as a whole are DISMISSED for lack of standing. Plaintiffs Jackson's and Duke's claim challenging N.C. Stat 84-34 is DISMISSED for lack of jurisdiction. The defendants' and intervenor-defendants' motions to dismiss are ALLOWED. Plaintiff Duke's claims against defendants C. Colon Willoughby, Jr. And Roy Cooper are DISMISSED for lack of standing. Plaintiff Duke's, IEPAC's and SPAC's claims against the members of the State Board of Elections challenging N.C. Gen. Stat 163-278.12(e2)(3), 163-278.66, and 163-278.67 and the public financing scheme as a whole are DISMISSED for failure to state a claim.

This Judgment Filed and Entered on March 30, 2007 and Copies To:

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(E.D.N.C. March 30, 2007)

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March 30. 2007 /s/ DENNIS P. IAVARONE. CLERK

2008 N.C. Sess. Laws 150 (pertinent portions)

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

SESSION LAW 2008-150
SENATE BILL 1263

AN ACT TO ESTABLISH THE JOINT LEGISLATIVE ELECTIONS OVERSIGHT COMMITTEE; TO CLARIFY THE NEW ELECTION STATUTE AS IT APPLIES TO MULTISEAT RACES; TO REAUTHORIZE THE PILOT PROGRAM FOR INSTANT RUNOFF VOTING; TO AMEND THE STATUTE CONCERNING NOTICE OF AN ELECTION-PROTEST ORDER AND THE TIMING OF APPEAL; TO CLARIFY THE MEANING OF THE TERM "ELECTION" FOR PURPOSES OF THE THIRTY-DAY RESIDENCE REQUIREMENT FOR VOTING; TO RESPOND TO THE DECISION OF THE 4TH CIRCUIT U.S. COURT OF APPEALS IN NORTH CAROLINA RIGHT TO LIFE V. LEAKE; TO REPLACE THE TWENTY-ONE-DAY CONTRIBUTION EMBARGO IN THE JUDICIAL PUBLIC CAMPAIGN PROGRAM WITH AN EXPEDITED RELEASE OF MATCHING FUNDS; TO EXEMPT CERTAIN SALES OF GOODS OR SERVICES BY POLITICAL PARTY EXECUTIVE COMMITTEES FROM CERTAIN CONTRIBUTION REQUIREMENTS; TO REQUIRE ALL TREASURERS TO REPORT ACCORDING TO THE MUNICIPAL

2008 N.C. Sess. Laws 150 (pertinent portions)

CAMPAIGN REPORTING SCHEDULE IF THEIR CANDIDATES OR COMMITTEES PARTICIPATE IN MUNICIPAL ELECTIONS; TO PROHIBIT COMMINGLING OF CAMPAIGN FUNDS; TO REQUIRE THAT NEW-PARTY CANDIDATES BE REGISTERED WITH THE PARTY; TO AMEND THE REPORTING REQUIREMENT FOR MATCHING FUNDS IN PUBLIC FINANCING PROGRAMS; TO LIMIT THE PROHIBITION IN THE ELECTIONEERING COMMUNICATIONS STATUTES; AND TO REQUIRE FORTY-EIGHT-HOUR REPORTS FOR ANY CONTRIBUTION OF LATE CONTRIBUTIONS OF MORE THAN ONE THOUSAND DOLLARS, REGARDLESS OF THE SOURCE; AND TO MAKE RELATED CHANGES.

The General Assembly of North Carolina enacts:

. . . .

SECTION 7.(a) G.S. 163-278.13(e2)(3) is repealed.

SECTION 7.(b) G.S. 163-278.67 is amended by adding a new subsection to read:

"(c1) Expedited Distribution of Matching Funds. – When a candidate becomes entitled to any amount of matching funds under subsection (a) of this section, the Board shall authorize the issuance of that amount

to the candidate as soon as practicable. The Department of Administration shall transfer that amount to the candidate as soon as practicable and in no event later than 12 hours after receiving notice from the Board that the candidate has become entitled to it. The Department of Administration shall develop a method of rapidly transferring funds to a candidate or otherwise fulfilling the requirements of this subsection in conjunction with the Board. The candidate shall return to the Board as soon as practicable any amount of the matching funds that the candidate has not spent at the date of the election or at the time the individual ceases to be a certified candidate, whichever occurs first."

SECTION 7.(c) This section is effective when it becomes law.

. . . .

SECTION 10.2.(a) G.S. 163-278.66(a) reads as rewritten:

"(a) Reporting by Participating and Certified Candidates. Reporting by Noncertified Candidates and Other Entities. – Any noncertified candidate with a certified opponent shall report total ~~income, expenses, and obligations~~ contributions received to the Board by facsimile machine or electronically within 24 hours after the total amount of ~~campaign expenditures or obligations made, or funds raised or borrowed,~~

contributions received exceeds eighty percent (80%) of the trigger for matching funds as defined in G.S. 163-278.62(18). Any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate, or paying for electioneering communications, referring to one of those candidates, shall report the total ~~funds received, spent, or obligated for those~~ expenditures or payments made to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures ~~or obligations made, or funds raised or borrowed,~~ or payments made for the purpose of making the independent expenditures or electioneering communications exceeds five thousand dollars ($5,000). After ~~this~~ the initial 24-hour filing, the noncertified candidate or other reporting entity shall comply with an expedited reporting ~~schedule by filing additional reports after receiving each additional amount in excess of one thousand dollars ($1,000) or after making or obligating to make each additional expenditure(s) or payment(s) in excess of one thousand dollars ($1,000).~~ schedule. The schedule and forms for reports required by this subsection shall be ~~made according to procedures developed~~ supplied by the Board."

. . . .

2008 N.C. Sess. Laws 150 (pertinent portions)

SECTION 10.2.(c) This section is effective when it becomes law.

In the General Assembly read three times and ratified this the 18th day of July, 2008.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 8:34 p.m. this 2nd day of August, 2008